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person and dies, all rights of action against the wrongdoer are lost. Yet an exact parallel may be drawn from the undoubted common law rule that an injury which is not fatal gives to the one suffering it a cause of action, but if the death of the complainant results from the injury, the tort feasor escapes all civil liability. Nor can the result be justified on the ground that at the present time assignability and survivability of actions are the rule and their abatement the exception, for this state of the law has been reached almost entirely by the passage of statutes and not by a development of the common law. It well may be that public policy requires that an action under the Sherman Law should survive, but this result would be reached preferably by an express legislative enactment rather than by straining the common law to cover a case not within the scope of actions affecting the personal estate, especially in view of the fact that no specific property of the plaintiff is injured.[22]

ANNULMENT OF MARRIAGE BECAUSE OF INSANITY.—As a valid contract of marriage requires the mutual consent of two persons of sound mind, the courts can annul a marriage because of the mental incapacity of the parties.[1] While this fundamental principle has always been recognized, the authorities have found it difficult to definitely state the degree of sanity necessary to make the marriage valid. At one time it was considered that there must be the same capacity as is required for other contracts.[2] But some jurisdictions did not demand as great a degree of intelligence as is stated in this rule, while others considered that more capacity was necessary for a contract which bound both the person and his property for life than one which related only to property.[3] Perhaps the most widely accepted test is the one by which the parties must be able to understand the nature of the contract and have some idea of the obligations to be assumed.[4] It follows from this doctrine that the insanity must exist at the time the contract is made in order to invalidate it. Thus the fact that a party was

[22]But see Cleland *v.* Anderson (1905) 75 Neb. 273; *cf.* Strout *v.* United Shoe Machinery Co. (1912) 195 Fed. 313. See Fletmann *v.* Welsbach Lighting Co. (U. S. Supreme Court, Oct. Term 1915. Nos. 145 and 146, January 24, 1916) holding that an equity suit cannot be maintained under § 7 of the Sherman Law by a single stockholder to recover threefold damages for injuries to the corporation, when the corporation refuses to sue at law. This effectually disposes of the contention, considered pertinent in the principal case, that a cause of action under § 7 can be reached by the creditors of the injured party, unless that party can be forced to sue for their benefit.

[1]True *v.* Ranney (1850) 21 N. H. 52; Wightman *v.* Wightman (N. Y. 1820) 4 Johns. Ch. 343; see Middleborough *v.* Rochester (1815) 12 Mass. 373; Clark *v.* Fields (1841) 13 Vt. 460. The last case was one where there never was a contract, since the parties thought they were becoming engaged instead of married.

[2]Atkinson *v.* Medford (1859) 46 Me. 510; Anonymous (1826) 21 Mass. 32; Dunphy *v.* Dunphy (1911) 161 Cal. 380, 119 Pac. 112. This also seems to be part of the test in Browning *v.* Reave (1812) 2 Phillim. 69; Cole *v.* Cole (1857) 37 Tenn. 57.

[3]1 Bishop, Marriage, Divorce and Separation, 597, 598.

[4]Meekins *v.* Kinsella (N. Y. 1912) 152 App. Div. 32, 136 N. Y. Supp. 806; see 2 Nelson, Divorce and Separation, § 653. Attempts to refine this broad rule have been made, but without much success. Nelson says the parties must have affection for each other, 2 Nelson, Divorce and Separa-

insane before and after the marriage would not be sufficient grounds to annul it, but would only be evidence toward proving insanity at the time.[5] Nor would the fact that a committee had been appointed invalidate the marriage, for it might have taken place during a lucid interval. By statutory provisions in England, however, the fact that a person has been adjudged insane makes it impossible for him to marry.[6]

While the marriage of a lunatic is void without the necessity of a judicial decree, nevertheless, for the sake of public decorum, the marriage should be officially declared invalid.[7] Furthermore, as the question of the validity may be litigated in collateral suits, in which the decisions would be conclusive only as to those particular suits, it is proper that some tribunal have the power to annul the marriage and preserve a judicial record of its decree.[8] In England, this authority was formerly vested in the ecclesiastical courts.[9] But as ecclesiastical courts were never a part of the judicial system in this country, there developed an interesting controversy as to whether equity might claim the power as part of its jurisdiction. This was particularly true in New York.[10] According to the dicta in some cases of this jurisdiction, equity has no inherent power to annul a marriage;[11] but there are other statements to the effect that while most of the actions for annulment are derived wholly from the statute, there are some which independent of the statute come under the original jurisdiction of the court.[12] As marriage is a civil contract, the latter doctrine is sound, for equity has always had power to annul for fraud or incapacity to contract.[13] The dicta, moreover, in the cases which appear to contradict this theory do not in fact refute it, for the causes of action in those cases did not involve fraud or lunacy, the two grounds for original equity jurisdiction.[14] From

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tion, § 659, but affection is not really essential. The capacity to earn a livelihood, see St. George *v.* City of Biddeford (1885) 76 Me. 593, and the ability to compare and choose between the supposed advantages and gratifications to be obtained by marriage and those gained by abstaining from it, Doe *v.* Roe (N. Y. 1846) Edm. Sel. Cas. 344, have been mentioned as parts of the test. It is submitted that a marriage might well be valid without fulfilling any of these further qualifications of the rule.

[5]Nonnemacher *v.* Nonnemacher (1894) 159 Pa. 634, 28 Atl. 439; see Banker *v.* Banker (1875) 63 N. Y. 409.

[6]15 Geo. II, c. 30.

[7]Powell *v.* Powell (1877) 18 Kan. 371. Such marriages in New York are voidable and not void. Domes. Rel. Law, § 7.

[8]See Ferlat *v.* Gojon (N. Y. 1825) Hopk. Ch. 478; Waymire *v.* Jetmore (1872) 22 Ohio 271.

[9]2 Pollock & Maitland, History of English Law, 367.

[10]See an article by W. A. Purrington, 9 Columbia Law Rev., 321, 335.

[11]See Pengult *v.* Phelps (N. Y. 1867) 48 Barb. 566; Stokes *v.* Stokes (1910) 198 N. Y. 301, 91 N. E. 793.

[12]Griffin *v.* Griffin (1872) 47 N. Y. 134; Wightman *v.* Wightman, *supra*; see Berry *v.* Berry (1909) 130 App. Div. 53, 114 N. Y. Supp. 497; Ferlot *v.* Gojon, *supra*.

[13]Carris *v.* Carris (1873) 24 N. J. Eq. 516; Clark *v.* Field, *supra*; see Turver *v.* Meyers (1808) 1 Hagg. Consist. 414.

[14]Thus, Pengult *v.* Phelps, *supra*, was a case where a woman went to another state and married contrary to a decree of divorce in New York. It is interesting to note that the statutory provision was passed in order to limit the claim of equitable jurisdiction over incestuous marriages suggested by Chancellor Kent in Wightman *v.* Wightman, *supra*. See Griffin *v.* Griffin, *supra*.

this it will be seen that the conflict in the New York cases is more apparent than real.

The question of the inherent power of equity in suits to annul a marriage for lunacy has recently been raised again in the case of *Walter* v. *Walter* (App. Div., 1st Dept. 1915) 156 N. Y. Supp. 713. In this case the committee of the person and the property of the incompetent brought the action. The court held that the committee was not entitled to sue under §§ 1747, 1748 of the Code of Civil Procedure because they were not named therein, nor under § 2340. This last section allows the committee to bring such actions as the lunatic could have brought. The court reasoned, that the lunatic could not sue until he regained his sanity, at which time be it noted there would be no need of a committee, and that therefore, the committee could not bring the action. In jurisdictions where the statutes have not specifically mentioned the parties who may sue, the committee or the guardian has been allowed to bring the action because of the concern of equity to relieve the unfortunate party from the contract.[15] It is true that in two jurisdictions, codes naming the parties who may sue, have been held to exclude the committee or guardian because they were not named.[16] But these courts seems to have put a narrow construction on the statutes, particularly if equity is considered as having inherent jurisdiction. Moreover, there is no provision in the codes of those states like § 2340 of the New York Code.

Even though it be granted that § 7 of the Domestic Relation Law of New York limits the right to bring an action for annulment of marriage to those persons specifically named in the code, still § 2340 should bring the committee within the statute.[17] In the dissenting opinion of the principal case, Justice Scott considered that the section should be read so as to allow the committee to bring such actions as the lunatic might have brought if sane. This interpretation seems reasonable, and it is probable that the legislature so intended the section to be construed because it is the duty of the state to protect persons deprived of their mental faculties from their own insane acts.[18] The committee as an officer of the court[19] is one of the agencies employed by the state to discharge this duty. It would, therefore, be unreasonable for the state to impose this duty on the committee, and at the same time, by a meaningless statute, compel it to stand by remediless in the face of a fraudulent marriage with its consequent effect on the property rights of the lunatic. To say that the committee cannot bring the action because the lunatic on account of his incapacity cannot bring it, deprives the section of all effect since the lunatic can never sue so long as he is insane, and if he regains his

[15]Waymire *v.* Jetmore, *supra*; Pyott *v.* Pyott (1901) 191 Ill. 280, 61 N. E. 88. This last case distinguishes an action to annul from an action for divorce where the lunatic would have to be a party.

[16]Mackey *v.* Peters (1903) 22 App. Cas. D. C. 341; Pence *v.* Aughe (1884) 101 Ind. 317.

[17]Domes. Rel. Law, § 7. It might very well be argued that the statute refers to grounds for the action and not to parties who may sue. This seems probable because the inherent equitable grounds are now in the statute, and in Griffin *v.* Griffin, *supra*, it is said the statute was to limit the grounds for the action.

[18]See Sporza *v.* German Savings Bank (1908) 192 N. Y. 8, 14, 84 N. E. 406. It was intended that § 2340 "should embrace all cases where a remedy is pursued." See note to § 2340, Throop's Ann. Code 1880.

[19]Smith *v.* Keteltas (1898) 27 App. Div. 279, 50 N. Y. Supp. 471.

reason the committee is discharged. It is hard to believe that the legislature intended to clothe the committee with a power it could never exercise. The committee, the only one charged in law with the care of the incompetent's property, should be permitted to protect him from those who would take advantage of his unfortunate position. It is submitted, therefore, that because of the inherent power of equity, and the duty of the state toward the insane, that the section should be liberally construed.

EFFECT OF EXECUTION UNDER EQUAL JUDGMENT LIENS.—In the recent case of *Hulbert* v. *Hulbert* (1916) 216 N. Y. 430, the New York Court of Appeals, in reversing the Appellate Division, has laid down the rule that as between judgments attaching simultaneously as liens to land subsequently acquired by the judgment debtor, no priority can be obtained by the creditor first issuing execution.[1] The lack of authority on which the decision may be rested warrants an investigation of the principles underlying the hitherto generally accepted rule that priority can be gained in this manner. The question may arise either from the simultaneous rendering, entering, or docketing of two or more judgments against the debtor who at that time owns land;[2] or from the acquisition of land by the debtor subsequent to the rendering, entering, or docketing of two or more judgments against him.[3] In both cases the liens attach simultaneously, and the creditors must share *pro rata* if the property is not enough to satisfy both, unless priority may be later acquired by the creditor first issuing execution entitling him to a full satisfaction of his judgment.

All authorities agree that priority may be so acquired, and base their opinions on the New York cases of *Adams* v. *Dyer* and *Waterman* v. *Haskin*, which are overruled by the principal case.[4] An attempt

[1]The decision of the Appellate Division is discussed in 15 Columbia Law Rev., 173.

[2]Black, Judgments (2nd ed.) § 443. In New York the judgment becomes a lien from the date of docketing. N. Y. Code Civ. Proc., §§ 1250, 1251.

[3]Gay *v.* Rainey (1878) 89 Ill. 221; Matter of Hazard (N. Y. 1893) 73 Hun 22, aff'd. in 141 N. Y. 586, 36 N. E. 739. In Oregon, by the doctrine of relation back, the liens, although attaching simultaneously, are referred back to the date of the judgments, and the senior lien has priority. Creighton *v.* Leeds (1881) 9 Ore. 215. This case is criticised in Ware *v.* Delahaye (1895) 95 Iowa 667, 64 N. W. 640, where an opposite result was reached under a similar statute. In Pennsylvania and Ohio no judgment liens attach to after acquired property, and the execution therefore determines priority among the creditors. Colhoun *v.* Snider (Pa. 1813) 6 Binn. 135; Roads *v.* Symmes (1824) 1 Ohio 281. The word "lien" is used merely to denote the right of the creditors to satisfy his judgment by execution. Ross & Co's Appeal (1884) 106 Pa. 82.

[4]Adams *v.* Dyer (N. Y. 1811) 8 Johns. 347; Waterman *v.* Haskin (N. Y. 1814) 11 Johns. 228. These cases are regarded as establishing the law for the following jurisdictions: Bliss *v.* Watkins (1849) 16 Ala. 229; Smith *v.* Lind (1862) 29 Ill. 24; Michael *v.* Boyd (1848) 1 Ind. 259; Cook & Sargent *v.* Dillon (1859) 9 Iowa 407; Burney *v.* Boyett (1834) 2 Miss. 39; Bruce *v.* Vogel (1866) 38 Mo. 100. See Freeman, Judgments (3rd. ed.) § 374; Black, Judgments (2nd ed.) § 455; Rorer, Judicial Sales, §§ 579, 826. It is true, however, that in Iowa the general rule, though applied to judgments entered on the same day, is not applied to judgment liens on after-acquired property. Kisterson *v.* Tate (1895) 94 Iowa 665, 63 N. W. 350.